DATO' MUSTAPHA HJ ALI

v.

PENGURUS PEJABAT TEMPATAN, PERTUBUHAN KESELAMATAN SOSIAL PEKERJA KOTA BHARU

HIGH COURT MALAYA, KOTA BHARU
ARIFIN ZAKARIA J
[CIVIL SUIT NO: MT(3) 22-96-98]
26 OCTOBER 1999

CIVIL PROCEDURE: *Striking out - Abuse of process - Rules of the High Court 1980, O. 18 r. 19(1)(b), (c) & (d) - Appellant charged with offences under Employees Social Security Act 1969 - Application for declaration that charge was unmaintainable as Act did not apply to appellant - Application to injunct prosecution from proceeding - Whether suit scandalous, frivolous or vexatious - Whether to be struck out*

CIVIL PROCEDURE: *Jurisdiction - High Court - Jurisdiction to grant declaratory relief - Appellant charged with offences under Employees Social Security Act, 1969 - Application for declaration that charge was unmaintainable as Act did not apply to appellant - Application to injunct prosecution from proceeding - Whether court seised with jurisdiction to grant relief - Whether disputes properly within jurisdiction of Appeal Board constituted under Act - Employees Social Security Act 1969, ss. 83, 84*

The plaintiff, an advocate and solicitor, was charged before the Magistrate's Court for failing to make contribution to the defendant on behalf of himself and his employees in contravention of the provisions of the Employees Social Security Act 1969 ('the Act'). Whilst the charge was pending, the plaintiff applied to the High Court ('the suit') for a declaration that the Act did not apply to him or his employees, and for an injunction to restrain the defendant from taking any action against him pursuant to the Act. The suit, however, was struck out by the learned Senior Assistant Registrar ('SAR') on grounds that: (i) it was scandalous, frivolous or vexatious or an abuse of process; and (ii) the disputes as raised by the plaintiff ought properly to be referred to the Appellate Board constituted under the Act by virtue of s. 84 thereof. The plaintiff appealed and the main issue that arose was whether, notwithstanding s. 84 of the Act, the court has jurisdiction to grant the declaratory relief prayed for by the plaintiff.

Held:

[1] Where criminal proceedings had properly been instituted and were not vexatious or an abuse of the process of the court, it was not a proper exercise of the court's discretion to grant to the defendant in those proceedings a declaration that the facts to be alleged by the prosecution did not in law prove the offence charged.

[2] In this case, since criminal proceedings had already been instituted against the plaintiff for offences under the Act, it is highly inappropriate for this court to grant the declarations sought by the plaintiff. The authorities also showed that this court has no original jurisdiction to grant such relief, in view of the provisions of s. 84(1) of the Act, which gives the Appellate Board exclusive jurisdiction to determine the issue as raised by the plaintiff.

[Appeal dismissed; plaintiff's suit struck out.]

Case(s) referred to:

AG of Hong Kong v. Zauyah Wan Chik & Ors & Another Appeal [1995] 3 CLJ 35 ***(refd)***

Arjunan v. Kesatuan Kebangsaan Pekerja-pekerja Ladang [1993] 1 CLJ 481 ***(foll)***

Barnard v. National Dock Labour Board [1953] 2 QB 18 ***(refd)***

Hanisah v. Tuan Mat [1970] 1 MLJ 213 ***(refd)***

Imperial Tobacco Ltd v. AG (HL (E)) 2 WLR 467 ***(foll)***

Nor Azlan Mad Azros & Anor v. Hj Jumaat Yusoff (President) & Ors [1990] 2 ILR 206 ***(foll)***

Legislation referred to:

Employees Social Security Act 1969, s. 83, 84(1)

Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d)

For the plaintiff - Dato Wan Mustapha Hj Ali; M/s Wan Mustapha & Co

For the defendant - K Maniam; M/s Skrine & Co

Reported by WA Sharif

JUDGMENT

Arifin Zakaria J:

In this suit the plaintiff/appellant ("the plaintiff') is seeking the following relief namely:

(1) A declaration that the Employees Social Security Act 1969 ("the Act") is only applicable to employers in the industrial sector and not to lawyers such as the plaintiff.

(2) A declaration that a clerk in a legal firm is not an employee within the meaning of the Act and no contribution is payable in respect of such employee.

(3) A declaration that the plaintiff or his legal firm need not pay the contribution under the Act.

(4) An injunction to restrain the defendant or its servant or agent from taking any action or proceeding against the plaintiff for failing to pay contributions in respect of his clerks or staff under the Act.

The defendant/respondent ("the defendant") having filed its defence then proceeded by way of summons-in-chambers to have the plaintiffs action struck out under O. 18 r. 19(1)(b), (c) and (d) of the Rules of the High Court 1980 ("the RHC"). This application is supported by the affidavit of Kathiravelu a/l Veerasamy the legal officer attached to the defendant. In his affidavit En. Kathiravelu contended, *inter alia*, that the plaintiff who is practising as an advocate and solicitor in the High Court of Malaysia is subject to the Act. On that premise the plaintiff is therefore legally bound to make his contribution under the Act in respect of his employee. Secondly the defendant contended that any dispute as raised by the plaintiff in this suit should properly be referred to the Board ("the appellate board") constituted under the Act and could not properly be brought to this court. It is contended that this court has no jurisdiction to hear any dispute arising under the Act. Substantially, those were the issues arising in this case.

The learned SAR having heard the arguments of both parties allowed the defendant's application with costs and the plaintiff being dissatisfied with the said decision now appeals to this court. In her grounds of decision the learned SAR stated thus:

"1. Mahkamah ini bersetuju dengan hujah defendan bahawa perkataan "Industri" seperti yang didefinisikan di s. 2(10) ESSA adalah juga terpakai untuk "calling, service and employment."

Di sini, peguam defendan menghujahkan bahawa perkataan "employment" telah ditafsirkan sebagai "A person's trade, profession or occupation" oleh Oxford English Dictionary. Oleb itu, Mahkamah ini bersetuju bahawa perkataan "Industri" di dalam ESSA adalah juga merujuk kepada Majikan Firma Undang-Undang.

2. Mahkamah ini juga bersetuju dengan hujah peguam defendan bahawa sekiranya plaintif mempunyai sebarang kemusykilan atau keraguan sama ada beliau termasuk di dalam kategori majikan yang perlu membayar caruman kepada kakitangannya, plaintif seharusnya merujuk kepada Badan Jemaah Rayuan yang ditubuhkan di bawah ESSA. Di sini, Mahkamah ini merujuk kepada s. 84 ESSA 1969. Seksyen 84(1) memperuntukkan:"

The learned SAR largely relied on the case of *Nor Azlan bin Mad Azros & Anor v. Hj. Jumaat Yusoff (President) & 9 Ors*. [1990] 2 ILR 206 in support of her decision. I shall refer to this case in the later part of this judgment.

The plaintiff's contention in the main is that notwithstanding the provisions of s. 84 of the Act the court has jurisdiction to grant declaratory relief as prayed by the plaintiff herein. He cited the case of *Barnard v. National Dock Labour Board* [1953] 2 QB 18, 399 in support of his contention. In that case the National Dock Labour Board was required by statutory regulations to delegate disciplinary functions to local boards, and the London Dock Labour Board (one of such local boards) purported to delegate these disciplinary functions to the port manager. The port manager suspended Barnard and certain other dock workers from work and pay for refusing to carry out certain orders. They appealed to the statutory appeal tribunal, but their appeals were dismissed. They then claimed a declaration in the High Court that they had been wrongfully suspended and also finding on discovery of documents two years after the event that they had been suspended by the port manager and not by the local board a further declaration that the original suspension was *ultra vires* and invalid. Mc Nair J held that the court had jurisdiction to grant a declaration in such circumstances, but that the local board had power to delegate the disciplinary functions to the port manager. The Court of Appeal reversed Mc Nair J's decision that the local board had power to delegate the disciplinary functions in this way, and affirmed his decision that the court has a discretion to grant a declaration and injunction against a tribunal (whether statutory or domestic) where the applicant would otherwise have no remedy for an injustice.

Denning LJ at p. 401 had this to say:

> I know of no limit to the power of the court to grant a declaration except such limit as it may in the discretion impose upon itself.

And further at p. 402 he said:

> The authorities show clearly that the courts can intervene. A good instance of the remedy by injunction is *Andrews v. Mitchell* ([1905] AC 78, 79), when a statute enacted that the decision of a particular tribunal should be "binding and conclusive on all parties without appeal, and shall not be removable into any court of law or restrainable by injunction ([1905] AC 78, 79); but nevertheless the House of Lords held that the court could, in an action for an injunction, set aside a decision which was not given in accordance with the rules. A good instance of the remedy by declaration is *Cooper v. Wilson* ([1937] 2 KB 309), where a watch committee, erected under statute, had dismissed a police sergeant when they had no power in law to do so, and had also acted in a way contrary to natural justice. Greer and Scott LJJ held that on both grounds the sergeant

was entitled to a declaration that the order of the watch committee was invalid. Furthermore, in *Leeson v. General Council of Medical Education and Registration* ([1890] 43 Ch. D 366), and in *Allinson v. General Council of Medical Education and Registration* ([1894] 1 QB 750), this court assumed without question that the court has power to intervene by declaration and injunction in the case of statutory tribunals just as it has in domestic tribunals, and I do not think that we should admit of any doubt upon it. We had occasion to examine the power in respect of domestic tribunals in *Lee v. Showmen's Guild of Great Britain* ([1952] 8 QB 329). The power is no less in respect of statutory tribunals.

The plaintiff in his argument also referred me to the case of *Hanisah v. Tuan Mat* [1970] 1 MLJ 213 where Ali FJ said, "The issue raised by the notice of motion necessarily involved the consideration of the question whether or not the appellant is a Malay within the meaning of the Kelantan Malay Reservations Enactment 1930. **A question of construction is a question for the court**" (The emphasis is mine). Similarly he said, in the present case it is for the court to decide whether the Act applies to a firm of advocate and solicitor, such as the plaintiff herein.

In considering this application I think it is necessary to consider the facts that lead to this application. This is stated in the affidavit in support of this application. In para 6 thereof it is stated that, on 1 December 1997 an officer of the Social Security Organisation ("the Organisation") had conducted a check at the plaintiff's office and discovered that the plaintiff as an employer failed to make contribution to the Organisation both on behalf of himself and his employees who among others include one by the name of Asiah bt. Hussin. The plaintiff was subsequently charged in the Magistrate's Court at Kota Bharu in respect of the said default and the case had been adjourned on numerous occasions on the ground that this case ought to be disposed of first. This allegation of facts on behalf of the defendant has not been denied by the plaintiff. Therefore, I take it as being correct and I shall proceed to determine the issue before me based on those facts.

Section 84(1) of the Act provides, *inter alia*:

84(1) If any question or dispute arises as to:

(a) Whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution; or

(b) The rate of wages or average daily wages of an employee for the purposes of this Act; or

(h) ..., such question or dispute subject to the provisions of subsection (3) shall be decided by the Board in accordance with the provisions of this Act.

The "Board" here refers to the appellate board established under s. 83 of the Act. Firstly, it was argued by the defendant that the questions for which the plaintiff is seeking the declaration from the court are questions falling within s. 84(1) of the Act and ought therefore to be determined by the appellate board. The court, it was contended, has no jurisdiction to entertain this application by the plaintiff. In support of this the defendant relied on the case of *Nor Azlan bin Mad Azros & Anor v. Hj Jumaat Yusoff (President) & 9 Ors. (supra)*. In that case the suit was commenced against five principal office bearers of an Employees Union and the scrutineers of the election. The defendants applied to have the action struck off. In allowing the application Mahadev Shanker J (as he then was) said at p. 208:

> It is trite law that a declaratory judgment cannot be given by the court in the exercise of its original jurisdiction where the only remedy open to the plaintiff is one prescribed by statute.
>
> The present case is not one concerning the exercise of a discretionary jurisdiction but a matter where there was an absence of jurisdiction altogether.

This case was followed by Abu Mansor Ali J (as he then was) in the case of *Arjunan v. Kesatuan Kebangsaan Pekerja-Pekerja Ladang* [1993] 1 CLJ 481; [1993] 1 MLJ 335. To further support his case the learned counsel for the defendant cited the case of *Imperial Tobacco Ltd v. A.G.* (H.L.(E)) 2 WLR 467. There the House of Lords in allowing the appeal held, *inter alia*, that where criminal proceedings had been properly instituted and were not vexatious or an abuse of the process of the court it was not a proper exercise of the Court's discretion to grant to the defendant in those proceedings a declaration that the facts to be alleged by the prosecution did not in law prove the offence charged, and that therefore a declaration should not have been made. In *Attorney General of Hong Kong v. Zauyah Wan Chik & Ors. and Another Appeal* [1995] 3 CLJ 35; [1995] 2 MLJ 620, there the CA had the opportunity of considering the case where no criminal proceedings had already been instituted. Gopal Sri Ram JCA held that in such circumstances the criminality or lawfulness of the future conduct can more readily be the subject of declaratory relief although it would be a very exceptional case in which it would be right to grant such a declaration. Reverting to the present case, since as alleged by the defendant that criminal proceedings had already been instituted against the plaintiff for offences under the Act, I think in the circumstances, it is highly inappropriate for this court to grant the declarations sought by the plaintiff

Secondly, relying on the above authorities I am also of the opinion that this court has no original jurisdiction to grant such a relief in view of the provisions of s. 84(1) of the Act which give the appellate board exclusive jurisdiction to determine the issues as raised by the plaintiff herein.

For the above reasons the plaintiff's action is struck out under O. 18 r. 19 of the RHC as being scandalous, frivalous or vexatious or an abuse of the process of the court.

The plaintiff is to pay the defendant's costs.